

**Town of Amherst  
Zoning Board of Appeals**

*DECISION*

**Applicant:** Carex, Inc., 9 Research Drive, Amherst, MA

**Date application filed with the Town Clerk:** April 2, 2009

**Nature of request:** Pursuant to MGLA Chapter 40A Section 8 and 15, the applicant hereby appeals the decision of the Building Commissioner dated February 6, 2009 sent to the applicant March 6, 2009, regarding the interpretation of Section 3.358.1, technical or professional offices.

**Address:** Research Drive (Map 21B, Parcel 81, PRP Zoning District)

**Legal notice:** Published April 8 and April 15, 2009 in the Daily Hampshire Gazette and sent to abutters on April 7, 2009

**Board members:** Barbara Ford, Eric Beal, Tom Ehrgood

**Submissions:**

The following information was provided to the Zoning Board of Appeals:

- One (1) copy of the application, filed with the Town Clerk on April 2, 2009, submitted by Peter MacConnell of Bacon, Wilson/Monsein MacConnell, P.C.;
- One (1) copy of a memorandum, ZBA FY2009-00032, dated April 17, 2009, prepared by staff.
- An email correspondence, compiled by staff, from David Bryne, dated April 17, 2009;
- A letter from Daniel Thibodeau & Paula Russell, dated April 20, 2009;
- An email correspondence from Alison Curphey, dated April 22, 2009; and
- An email correspondence from Denise Barberet, dated April 23, 2009;
- A packet of material, titled "Carex, Inc. ZBA Hearing April 23, 2009 7:30 P.M." submitted by Peter MacConnell;
- A letter from Mary Streeter, dated April 23, 2009;
- A one (1) page partial copy of Article 3, submitted by David Bryne;
- One (1) copy of a memorandum, ZBA FY2009-00032 (2), dated May 22, 2009, prepared by staff;
- One (1) copy of an email correspondence sent from Joel Bard at 12:05 A.M., dated June 4, 2009;
- One (1) copy of a memorandum, ZBA FY2009-00032 (3), dated June 4, 2009, prepared by staff;
- One (1) copy of an email correspondence sent from Joel Bard at 3:00 P.M., dated June 4, 2009;
- A packet of material, titled "Submissions on behalf of Larkspur Drive neighbors", submitted by Alan Seewald, dated June 4, 2009;
- An email correspondence sent at 1:07 P.M. on June 4, 2009 from Janet Daisley (received on June 5, 2009);
- An email correspondence sent at 9:54 A.M. on May 31, 2009 from Denise-Renee Barberet (received on June 8, 2009);
- A letter from Claire Norton, dated June 6, 2009 (received on June 9, 2009);
- A memorandum, ZBA FY2009-00032 (4), dated June 22, 2009;
- An email correspondence from Michael Jacques, sent at 12:18 P.M. on June 23, 2009 and containing a letter, dated June 23, 2009;

- An email correspondence from David Bryne sent at 3:29 P.M. on June 23, 2009;
- An email correspondence from John Lambdin, forwarded at 4:33 P.M. on June 23, 2009 and containing a letter, dated June 23, 2009;
- An undated and unlabeled map showing the prospective buildings in the PRP, submitted by Alan Seewald during the June 23, 2009 public hearing;
- A photograph, dated June 22, 2009, the New England Environmental building currently under construction, submitted by Alan Seewald during the June 23, 2009 public hearing;
- An undated photograph, undated, of the sign for Samuel Gladstone, M.D., Family practice, submitted by Alan Seewald during the June 23, 2009 public hearing;
- A photograph of the sign for Valley Medical Group, submitted by Alan Seewald during the June 23, 2009 public hearing; and
- A photograph of the sign for 29 Cottage Street, submitted by Alan Seewald during the June 23, 2009 public hearing.

**Site Visit:**

There was no site visit scheduled for this application.

**Public Hearing:** May 28, 2009

Mr. Ehrgood stated that on April 23, 2009, a three (3) panel Board, comprised of Tom Simpson, Eric Beal and himself, held a public hearing regarding this appeal and received written and oral testimony from the applicant and members of the public. On May 6, 2009, Mr. Simpson recused himself from further involvement in the application stating that he was made aware of circumstances that made it appropriate to recuse himself. As a result, the panel for this case had to be re-constituted. Mr. Simpson has been replaced by Barbara Ford, who will act as Chair of the re-constituted Board panel.

On May 20, 2009, Planning Department staff sent a letter to the involved parties and members of the public who spoke on April 23, 2009, which identified that the Board would convene on May 28, 2008 to continue the public hearing to June 4, 2009.

The purpose of this public hearing is to inform the applicant and public of the change to the Board's composition and that the hearing will be continued to June 4, 2009, at which time the hearing will be re-started in its entirety. Members of the public are encouraged to re-iterate their previous testimony.

Paula Russell, 54 Larkspur Drive, was in attendance.

**Public Hearing:** June 4, 2009

Ms. Ford read the preamble of the Zoning Board of Appeals. Ms. Ford stated that this is a continuance of hearing that was opened previously, but the panel has changed because one member has recused himself, and therefore the hearing would be re-started and all the evidence re-stated. Ms. Ford asked the other Board members if there should be an end time for the public hearing this evening.

The Board members agreed to evaluate the status of the public hearing at 9:30 P.M. and possibly continue the hearing to another date, if necessary.

Mr. MacConnell presented the application on behalf of the applicant, Carex, Inc., who is represented by Julia and Mickey Marcus. He stated that Mr. and Mrs. Marcus are residents of Amherst Woods and that he is accompanied by Greta LaMountain, an attorney from Bacon, Wilson, Monsien & MacConnell.

Mr. MacConnell stated that they are here regarding an appeal of a decision of the Building Commissioner which determined that doctor's offices are not allowed in the PRP Zone (Planned Research Park). He stated that they are appealing that decision.

Mr. MacConnell stated that in order to better understand the basis for the appeal, a brief history would be helpful. He stated the following:

- Mickey and Julie Marcus own a company called New England Environmental which does environmental consulting throughout New England. Their offices are on Research Drive which abuts Larkspur Drive. As the business expanded they began to look at other buildings and properties to expand into. There were two properties for sale next to their building which are located in the PRP Zone;
- New England Environmental had been renting the space there for a number of years and wanted to stay in the same general area and inquired about purchasing the land. They went through the normal due diligence of getting a zoning opinion and getting financing lined up for a new building for their environmental consulting business. They went to the extent of working out an agreement with the seller, contingent upon obtaining the necessary permits;
- They took their plans to the Planning Board for Site Plan Review approval for professional offices;
- They were granted Site Plan Approval for two 10,000 sq. ft. buildings, one on each lot. Based upon the zoning opinion, the financing, and the approval by the Planning Board they purchased the land;
- They designed a 10,000 sq. ft. building for New England Environmental, which is currently under construction. It will be a LEED certified, cutting edge green building. They are using all local contractors and local materials. They are also marketing the adjacent lot on which they want to build another building under the Site Plan Review approval;
- They had received an inquiry from a physician, who wished to build a building there for her office. That physician and her architect met with the Planning Department to get the process started, and were told by the Planning Department that a doctor's office was not allowed in the Professional Research Park. The physician went back to the Marcuses with that information and then the Marcuses requested a meeting with the Town Manager and Planning Director to identify what the issues were;
- As a result of that meeting, the Town Manager asked the Building Commissioner to give a formal opinion regarding an interpretation of the Zoning Bylaw. The Building Commissioner provided her opinion, and within it noted the right of appeal and therefore this appeal has come before the Zoning Board of Appeals;
- The Building Commissioner's letter is in the ZBA members' packet and it basically says that a physician's office is akin to a medical center, as opposed to a professional office and the Marcuses take great exception to that. They have reviewed the Zoning Bylaw which states in Section 3.3 that "for the purposes of this Bylaw, existing and future uses of land, buildings and other structures shall be allocated among the following categories. It is intended that every possible use be included in some category and a use that does not readily fall into any category listed shall be included in the one to which it is most similar";
- A review of the Bylaw indicated that there are really two potential categories, 1) is Section 3.358.1 which is "technical or professional offices such as architect, engineer, lawyer, financial services, or similar office providing services predominantly by appointment to the public in person on the premises". It is this use category under which they believe a physician's office should be regulated. The Building Commissioner has stated that a medical or dental center is a closer and more logical use category. The Marcuses strongly object to that finding, and believe that a physician's office is not a medical center;
- Upon review of various definitions; every dictionary, every legal treatise, every case they could find, when it discusses professionals, includes doctors. Chapter 156A of Massachusetts General Law is for professional corporations. The very first professional listed is doctor. Black's Law Dictionary and Webster's Dictionary talk about physicians and doctors as professionals;

- They believe that professional office is the category where it fits and that each and every physician is not a medical center. They believe that a medical center provides a broad range of medical services and that the nearby Valley Medical facility is a very good example of illustrating the definition of that use category. Valley Medical is about 500 yards from our site and provides colonoscopies, a Walgreen pharmacy, a wide range of different doctors, medical practices, minor surgical procedures and they truly are a medical center;
- Many hospitals call themselves medical centers. Baystate Medical Center and Holyoke Medical Center are medical centers that provide a wide range of services. A medical center provides a wide range of medical services to the public. Some may be predominantly by appointment, some not, but the appellants believe that a medical center is more than a physician's office or more than a couple of physicians. A very good example is the building where Stavros is now located in the PRP, which is 20,000 -30,000 square feet in size. If someone were to come in with 5-6 lawyer's offices, a few accountants, some engineers and a doctor, two or three different doctors, that is not a medical center. On that basis, a single physician or a couple of physicians does not constitute a medical center;
- It is important to look at is the meanings of the words. The framers of the Bylaw did not elect to define the term "medical center", nor did they give an expansive definition of professional offices. If the intent of this bylaw was to forbid physicians in a professional office area, then it would have been very simple to make a category for doctors and dentists. They didn't do that, instead they made the category of medical center or dental center;
- There is no question that a medical center is a more intense use than a professional office. ~~He~~ Mr. MacConnell believes that the framers of the Bylaw did that on purpose and that a medical center is a more intense use than a physician's office. Town Meeting could have limited the intensity in other ways, for example, they could have said you can't have more than four professionals; you can't have more 10 professionals;
- During development of Section 3.358.1, there had been a lot of consideration of traffic impacts. The way the town elected to deal with that was to say that in the professional office zone you cannot have office uses which predominantly see clients via drop-ins. Uses such as a bank where people just come or insurance agency, where people might just drop in, are not allowed. The Town elected to regulate that by stating that the customer, patient, client comes predominantly by appointment. If you review what a doctor, two doctors and a nurse practitioner, three doctors and a nurse practitioner do, it fits perfectly into a professional office designation. Those opposing the appeal have accused ~~us~~ the appellants of attempting to alter the Zoning Bylaw; this is not the case;
- The appellants have reviewed and interpreted the Bylaw and believe that their interpretation is the proper interpretation. What they are asking the Board to do is to interpret the current Bylaw. The Building Commissioner has interpreted it one way and has given a list of her reasons; in that interpretation, she noted that an argument might be made for permitting medical office consisting of one doctor under Section 3.358.1. The appellants are here today because a physician expressed interest in the property and they were told that physician's office is not allowed in this zone. Therefore they urge the Board to overturn the Commissioner's opinion and to state that a physician's office is allowed in the professional office zone;
- The Planning Department has provided you with a lot of history regarding the PRP, some of that is relevant and some of it is not. At some point in history Town Meeting came up with a new designation as medical center. The Marcuses do not believe that it is meant to replace professional offices but to expand and broaden the professional office category.

Mr. Ehrgood stated that he wanted to highlight a few sections of the Bylaw and legislative history, get the applicants' response, and describe what it is he believes the Zoning Board of Appeals are doing.

He said that he would really like the Marcuses to have a successful small business; would like doctors to be successfully located in Amherst; would like to have residents in Amherst not be unduly burdened by traffic, but doesn't believe that any of those things are relevant.

Mr. Ehrgood stated that he believes that the Board members are here to evaluate what the Bylaw says and determine how it applies in this case, without regard to policy issues or without trying to make decision as to whether traffic is too intense, etc. Mr. Ehrgood noted the information prepared by the Planning Department regarding the legislative history and stated that he would like to identify a few things that are important and then allow the applicant and public to respond.

Mr. Ehrgood stated the following:

- Section 2.03 is relevant. It states that “the purpose of the PRP District is to provide an open and attractive environment for office, research and low intensity industrial activities. The standards and regulations are intended to limit development to those activities that are non-commercial in nature and that operate in a clean and quiet manner”;
- Section 3.358.1 defines professional office. Counsel for the members of the public [in the materials submitted by Alan Seewald] points out that there is no reference to doctors and no reference to patients. Mr. Ehrgood added that he doesn’t know if there is any indication of scrupulous avoidance and asked about the relevance of there being no reference to doctors;
- In Section 5.012, which regulates offices as accessory uses to residences, Town Meeting showed itself quite able to focus on the office of the doctor or dentist and they are specifically referred to;
- The emphasis on quiet uses, which you see a lot of in reviewing the legislative history of the PRP Zoning District, is also an important consideration.

Mr. MacConnell responded as follows:

- Regarding Section 2.03, there is no question that upon review of the legislative history it was designed with that intent. Over the years it has evolved, and as indicated in the legislative history, there have been many attempts to change it including having to stimulate it, and to figure out how to use it. When Town Meeting and Planning Staff changed it, they simply didn’t go back and change the intent;
- Regarding professional offices, doctors were not listed, but they are so predominant as a profession that if the intent was to exclude them, they would be listed under a different use category. The framers of the Bylaw did not do that. Instead, Town Meeting went a step further and created medical and dental centers. That means small medical offices—a single doctor, two doctor, doctor and partner—should be considered under the professional offices category, but larger medical practice groups should be considered under medical or dental centers;
- Regarding doctors and medicine, they are so predominantly professional that it is not reasonable to infer that because they left out mention of doctors’ offices, they must have meant to not include it. If they had meant not to include them, it seems that they would have made a separate category. Under professional offices, the language didn’t say limited to, it said such as. Therefore, clearly a doctor is a professional and there is probably not anyone in this room that doesn’t think a doctor is a professional;
- Regarding the accessory use, it’s a different category, generally in a residential neighborhood, and is defined a little more clearly, perhaps because it is in a residential neighborhood and because it came about at a different time.

Mr. Ehrgood made reference to page 2 of a Planning Board Report to Town Meeting for Article 3 in 2003 that discusses office zoning, history and early zoning. In the first paragraph it talks about “the second category, professional offices, included medical, real estate, insurance and other professional offices with moderate to low levels of visitation and correspondingly lower impacts”. The second paragraph says that “in 1978, as a part of series of more significant zoning changes, the two office categories’ names were changed” and “professional offices became ‘real estate, insurance or professional office’. Medical offices, which had begun to evolve from individual doctor’s offices into medical centers, were given their own zoning category and have been regulated separately ever since”.

Mr. MacConnell stated that, that [the above noted comment] was their case entirely. He added that they had evolved into a bigger, more broad and comprehensive use, so Town Meeting came up with a new use. Not saying that doctors can't be there, but because now they associate more, they are bigger, they often have a more complex and comprehensive practice, that we need a new category for that. Not saying that you can't be a sole practitioner, or two practitioners in a building, but saying because they are getting bigger, we need a new category for that use. He added that it seems that if you are saying that doctors can't be in the professional office category, then it should state that.

Mr. Ehrgood responded that this language says "evolves from individual doctors' offices" and once you are two doctors you are evolved from an individual doctor's office.

Mr. MacConnell stated that the Board is reading one person's opinion as to what happened and although that person [Jonathan Tucker] is a talented person and planning professional, it is one person's opinion. He stated that the Board could make a decision that yes, two doctors is a medical center but does not believe that the Board could reasonably do that. He added that Ms. Weeks did say that perhaps one doctor is allowed.

Mr. MacConnell asked whether the line is at two doctors or fifty doctors. He stated he believes that because the town elected to not define medical center that when an applicant comes before the Commissioner and requests a use. If its ten doctors, maybe she says it is a medical center. However, what she said was that any doctor is a medical center and we strongly object to that and that he does not believe that any doctor is a medical center.

Mr. Ehrgood stated that he believes that the usage is not so much that the doctor is the center, but rather that the building in which the doctor is located is the center. He added that saying a doctor is a medical center is sort of nonsensical, but a doctor's office, or two or more doctors, is that a medical center? He stated agreement that the Zoning Bylaw is not a model of clarity in its definition. However, he added that it does seem that there are indications that certain types of medical activity were sort of pushed into this other category for regulation and there is an assertion, to Town Meeting, that this is the way medical practices have been regulated over time.

Mr. MacConnell stated that he does not believe that it is the intent of this Bylaw that two doctors could have an office in a building together with lawyers and engineers, etc. and it be called a medical center.

Ms. Ford proposed a situation in which a building contains several office suites with one suite occupied by one or more doctors. She asked what would happen if a second, or even a third, group of doctors wanted to occupy other suites in the building.

Mr. MacConnell stated that at some point the building could become a medical center, but he is not the one who would determine this. Those two doctors are not a medical center. It is incumbent upon the Town to make a definition, and in this case, it is incumbent upon the Zoning Board of Appeals to decide whether or not a physician's office is a medical center or a professional office. Northampton has a definition of a medical center which says that it is a building or buildings with a common area for medical offices. It's not a great definition, but it is a definition.

Mr. Ehrgood stated that he would like to identify the volume of traffic as an important issue to consider. In 2007 when Town Meeting changed 3.358 and identified three office categories: busy, moderate and low visitation. He asked Mr. MacConnell if he agreed with the argument, prepared by the counsel for the neighbors, that there is something different about the level of traffic produced by a doctor's office and the level of traffic produced by a lawyer's office.

Mr. MacConnell responded that if it were so important to Town Meeting, than why didn't they specifically address the issue. They talked about it for years and ultimately decided to include predominantly by appointment, on the premises. Everyone knows that doctor visits are predominantly by appointment and if they were trying to exclude doctors, they should have done it a different way. If you are looking to limit traffic, there are other ways to do so, such as maximum square footage, or number of employees. A large building could be designed to have 10 or 20 lawyers in it.

Mr. Ehrgood stated that it's not clear whether Town Meeting, in 2007, felt it had to eliminate doctor's offices because they may have felt that was done a long time ago.

Ms. LaMountain stated that it is her understanding that the accounts of specific Town Meeting members should not be taken into consideration, but they have reviewed videos of Town Meeting from 2004 to 2007 and there was talk of traffic, light industry, but there was no mention of doctor's offices.

Mr. Beal asked staff for confirmation that the information provided from Town Counsel [two emails dated June 4, 2009] were provided to the applicant. Mr. Bagg stated that the information was provided to both the applicant's attorney and the attorney representing neighboring residents.

Mr. Beal asked Mr. MacConnell if he had any objection to the Board considering the history that was provided or if there was anything that he believed is impermissible.

Mr. MacConnell stated that he does not have any objection, but noted that the opinion of Town Counsel indicates that the Board must determine what is relevant to this matter and decide what weight to give the information. He added that Town Counsel was quite clear that the intent of Town Meeting, or what they were thinking, is not part of the legislative history. For example if someone said they voted for something because they thought doctor's were included, that is not relevant, but the history of how the Bylaw has grown, is legitimate. He said that the normal and usual meaning of the words in the Bylaw is important and that it is troubling to think that a review of the entire history of the Bylaw is required any time there is a question. Mr. MacConnell stated that Town Counsel indicated that the intent of Town Meeting is impermissible in this case. He added that the Board should be considering whether a doctor's office is a professional office.

Mr. Beal asked Mr. MacConnell if he is correct, that a doctor's office is a professional office, has he identified any other sections of the Bylaw that may be affected by the determination, for example, would that open a door to some other development.

Mr. MacConnell stated that it could affect whether you can have a doctor's office in the Light Industrial Zone with a Special Permit and the PRP. Mr. MacConnell stated that professional offices and medical centers are already allowed by right in the General Business, Limited Business, Commercial, Business Village Center and Office Park zones.

Mr. Beal asked Mr. MacConnell, if he is correct, what authority would the Planning Board have in the Site Plan Review process to restrict a use or the intensity of a use?

Mr. MacConnell stated that the Site Plan Review is a matter of right and means that the Planning Board could help to design the site, including issues related to setback requirements, number of parking spaces, and those requirements may dictate the size and scope of a use. He added that he is not sure that the Planning Board can say, for example, that a use could only have three doctors.

Ms. Ford stated that the Board does not have any further questions at this time and asked if any member of the public would like to speak.

Mark Parent, Chairperson of the Town Commercial Relation Committee, explained that the Committee is appointed by the Select Board and serves as a liaison between Town government and the business community. He added that the committee advises the Select Board, Town Meeting and others on matters relating to commerce and economic activity, economic policy, bylaws, planning and zoning, public safety, traffic and parking. He stated that the Committee heard from the petitioner relative to this issue and the Committee has voted unanimously to support their petition. He added that the Committee has been involved in the PRP zoning district over the past seven years and seeks to have the Zoning Bylaw be more clear and concise and perceived as business friendly, specifically for those that meet the sensitivity issues of the Town. The PRP zones are very much underutilized and the Town has lost a lot of good businesses that the Town needs to supplement its tax base. It is for those reasons that the Committee is requesting that the Zoning Board of Appeals overturn the decision of the Building Commissioner and to allow professional offices to include doctors.

Mr. Ehrgood asked Mr. Parent why the Zoning Board of Appeals is the right place to solve this problem and not Town Meeting.

Mr. Parent stated that it is in the Boards purview based on the nature of the appeal. He added that the Bylaw should be clearly stated so that any business can rely on the written word. It is difficult to hear any argument that says doctors are not professionals.

Ms. Ford stated that the Board is to interpret the Zoning Bylaw as written and we cannot make changes to the Zoning Bylaw. That would be done through the Planning Board and by Town Meeting.

Alan Seewald stated that he is an attorney, practicing in Town for 25 years, representing several residents of Larkspur Drive. Mr. Seewald stated the following:

- He has watched with great interest and from different perspectives as the PRP has developed over the years. It is important to be clear what this case is not about: it's not about the building, whether or not it's a good idea to have doctors in the PRP; it's not about whether the TCRC thinks it's a good idea. That is what Town Meeting does. It is important, when reading the Bylaw, particularly the ambiguity that we are focused on here, to place the development of the Bylaw in its contextual history;
- As Mr. MacConnell pointed out, when the PRP was first created it really was intended to be a place for the spin-off developments from the University to locate, it was not a place where commercial and professional uses were permitted. Back in 1989, specifically, medical centers were removed from the PRP in an effort to spur the spin off development in these areas and to remove the pressure from competing business and professions from locating in this area;
- When we go back to the history, we see this in the 2003 Planning Board Report to Town Meeting, at this time and quite some time before that, doctor's offices for more than one doctor had been regulated as medical centers, however imprecise;
- Mr. MacConnell is right in one way, that if all the laws were written with pinnacle clarities, we would be out of business and this is a problem with the English language; it's a problem of draftsmanship that is very common in bylaws and state and federal statutes. The Zoning Board of Appeals is therefore functioning in a quasi-judicial role;
- The 2007 amendment was essentially a compromise between the competing parties of the earlier 2007 articles 13 and 14. Mr. Tucker [the Planning Director] in a letter to Ms. Marcus says that the language and the list of uses that were chosen to be examples in the PRP zone for office uses, were very carefully chosen to pick only those professional office uses that were very low traffic generating uses. It is very unusual for a lawyer to see four people an hour because most of the time spent by a lawyer is spent in court, drafting documents and researching; the reason that we have offices is not simply for people to come visit, that's not the essential work of most non-medical professionals;

- With that backdrop, the negotiations regarding the 2007 amendment went on and Mr. Tucker was the drafter of all of this language and makes clear that the reason medical uses are not reference at all in the 2007 amendment is because they weren't intended. The reason why Ms. LaMountain did not hear much about it at Town Meeting is because it was regulated in a different use category and had been for decades;
- If this question is framed in a different way, what Mr. MacConnell is urging the Board to do is to move medical offices out of the medical center and into the professional office category, by implication because it doesn't say we're doing that. This was the reality when the 2007 amendment was passed; medical offices for more than one doctor were covered under medical center;
- When one reads the letter that was in the packet filed by the petitioner and which is also contained in these materials [the packet submitted by Mr. Seewald], from Mr. Tucker, the drafter of the amendment, to the petitioner, he says at the beginning of the letter that he fully supports having modestly size and appropriately regulated medical offices in the PRP, and believes it is a good idea. He goes on to say that, "however, for reasons described below, my best understanding of the situation is that allowing these uses will require amendments to the Zoning Bylaw";
- Page 2 of the letter begins "second, as we have previously discussed, while the new use category would appear from its plain language to be appropriate for regulating these professional uses, the uses it currently lists were deliberately selected to have low levels of visitation";
- This was clearly the drafter's intent; to exclude the professional offices with higher levels of visitation and medical offices are clearly among them. Mr. MacConnell asked- if it is reasonable to consider a doctor's office a medical center, even though that's how it's been for decades - then what is a dental center. Do we have one huge conglomerate of dentists that would create a category for dental center. These are places where dental work is provided and where medical care is provided, that is what a medical and dental center is, in terms of this Bylaw;
- The rules of interpretation support that a medical center is a specific use category. The practice is to place uses in the more specific category before they are placed in a general category. When there is a specific category like medical center, and a medical use, the use is not put into the generic professional office use;
- Because the common understanding at the time of the 2007 amendment was that physicians would continue to be regulated under medical center, Town Meeting left off any reference to a health care use and any reference to a patient in the language of the Bylaw. Mr. MacConnell says that it's so common for a physician to be a professional, and no one is suggesting that a doctor is not a professional, but why wasn't there some inkling here that medical professionals are among the professionals that we are talking about in this bylaw;
- Just as Mr. MacConnell says, if they intended to leave it off, they would have said so, if they intended to move it out of medical center and into professional offices, they would have said so;
- To address Mr. Ehrgood's questions, there is always some cross-reference that's not caught and fixed. The PRP was intended to be non-commercial but there has been evolution towards allowing more businesses and professional offices in the PRP;
- It's been sort of a creep along the continuum as businesses have been allowed into the PRP. What Mr. MacConnell is asking you to allow for is for that creep to creep a little further. The question then becomes how do you overlay the limit between a doctor's office and a medical center and where is that line. It's imprecise, but it works that medical offices fit into a medical center category;
- As Mr. Ehrgood pointed out, in 5.012, Town Meeting knew exactly how to deal with physicians, specifically. They could have dealt with physicians by including them in the exemplary list of professions that were being permitted into the PRP by the 2007 amendment. When you look at the term "and similar offices" [in Section 3.358.1 of the current Zoning Bylaw], a doctor's office, in terms of the one impact that is at the center of the debate, is visitation. Visitation has always been at the center of the discussion and this is clearly a higher level of visitation than your typical financial planner has on a daily basis. That is why it was not included and that is why it has been excluded.

Ms. Ford opened the public hearing to other members of the public.

Katherine Atkinson, 24 Trillium Way, stated she is the doctor in question and currently runs a family physicians office with a partner, Paul Baecher and a nurse practitioner. She indicated that she is trying to establish a physician's office, with two or three providers and feels that it does not constitute a medical center. She indicated that she met with the Town Manager and understands that if her practice was a non-profit organization, it would be allowed in the PRP, which was the case with Valley Medical.

Mr. Bagg stated that he was unsure about how being a non-profit organization would affect the permitting process, however, indicated that Valley Medical was permitted through Plan Approval in 1988 when the Zoning Bylaw allowed medical centers by right. He added that the Zoning Bylaw changed in 1990, removing medical centers from allowed uses in the PRP District. He added that the Board has been advised by Town Counsel that, due to the nature of the request, which was not based upon a specific project or proposal but rather was based on whether a doctor's office is a medical center, this appeal shall not be decided on a site-specific basis.

Paul Baecher, spoke against the Building Commissioners opinion, summarized as follows:

- He has been practicing primary care for 26 years and that it is rare to have only a single doctor;
- The Zoning Bylaw needs to be changed to better define what is allowed and where;
- He believes that a family practice is not a medical center.

Baer Tierkel, 30 Dana Place, spoke against the Building Commissioner's opinion, summarized as follows:

- A single psychologist's office is an example of a professional office and that many such offices occupy the same building because their profession is so similar;
- A doctor's office is more like a professional office and not a medical center, which is more likely to have services such as surgery and urgent care.

Bruce Griffin, 44 Red Gate Lane, spoke against the Building Commissioner's opinion, summarized as follows:

- He was formerly a member of the Comprehensive Planning Committee and is employed by the company which will occupy the building currently under construction;
- Common sense should be applied and is concerned with the narrow interpretation that says only those uses listed are allowed in the PRP;
- The Zoning Board should allow the Professional Office Park to have professionals located in it.

Clare Bertrand, 610 Bay Road, spoke against the Building Commissioner's opinion, summarized as follows:

- She was involved in the Zoning Subcommittee discussions regarding the 2007 compromise amendments and is also a Town Meeting member;
- A doctor's office was in the scope of uses predominantly by appointment and the 2007 amendment intended to exclude retail uses in the PRP.

Paula Russell, 54 Larkspur Drive, spoke in favor of the Building Commissioner's opinion, summarized as follows:

- She is a direct abutter to the PRP District and is concerned the integrity of the neighborhood from the complete build-out of the PRP District with doctor's offices allowed;
- The Bylaw says that the uses in the PRP are to be predominantly by appointment and that should not include doctors;
- Medical offices were not intended to be allowed uses in the PRP District and referenced several Planning Board Reports to Town Meeting provided by staff, including Article 3, 2003.

Mary Streeter, 66 Larkspur Drive, spoke in favor of the Building Commissioner's opinion, summarized as follows:

- She is a Town Meeting member and has been involved in the discussions that led to the compromise amendment of Article 7, 2007;
- Medical offices were not included in the discussion because they were told repeatedly by Planning Department staff and Planning Board members that medical and dental uses were regulated through a different category;
- It is reasonable to conclude that the building would ultimately include more than two doctors and a nurse practitioner if the opinion of the Building Commissioner is overturned;
- At the Zoning Subcommittee meeting of February 18, 2009, the Committee voted not to take a new amendment to the Bylaw to Town Meeting which defined a medical center, due to inadequate time to review the proposed amendment.

Mr. Beal asked that any further testimony from the public not repeat information that has already been provided to the Board, whether in previous testimony or written documents.

John Kuhn, 147 Chestnut Street, spoke against the Building Commissioner's opinion, summarized as follows:

- He is the architect that has been working with the applicant and has been a resident of the Town for over 30 years and has watched the development of the PRP District;
- Originally the District was intended for scientific and laboratory work, which turned out to be too restrictive and ultimately led to Town Meeting expanding the uses allowed;
- A doctor's office is a professional office where people are required to make appointments and that he believes that the Town should be supporting these types of uses.

Molly Turner, 194 Amity Street, spoke in favor of the Building Commissioner's opinion, summarized as follows:

- The ZBA is charged with interpreting the Zoning Bylaw and must think about the spirit of the Bylaw, including its purpose to protect the public welfare and well-being of the residents of the town and not about the convenience of entrepreneurs or developers;
- The expansion of the uses in the PRP appropriately went through the Town Meeting process with thorough discussion and understanding that the additional uses would minimally impact the surrounding neighborhood and residents;
- The spirit of the comprehensive plan is to focus the development into the centers and not the outlying residential areas.

Alan Root, 33 Kellogg Avenue, spoke in favor of the Building Commissioner's opinion, summarized as follows:

- The words medical center are very imprecise, but in this instance it was used within a context to try to have influence on the amount of traffic that would occur from various uses;
- The allowed professional offices were intended to be occupied by professions that have fewer and longer meetings than a doctor would.

Mr. MacConnell interjected to state that a lot of what has been said is not what the submitted documents say and that based upon the information from Town Counsel, the Board shall not consider the thoughts and intent as observed by individual Town Meeting members.

Ms. Ford noted Mr. MacConnell's concern and stated that the public's testimony is to be taken during the public hearing and the Board will need to distinguish what information is relevant to the case.

Denise Barberet, 67 North Whitney Street, spoke in favor of the Building Commissioner's opinion, summarized as follows:

- She has been a Town Meeting member since 2000 and a Planning Board member since 2007, is familiar with the question of traffic and development in the PRP District and was present at the discussions of the compromise article of 2007;
- The issue of traffic has been a big concern all along and was discussed in the Planning Board Report to Town meeting of 2007 with respect to the number of clients;
- She was present at the February 18, 2009 meeting of the Zoning Subcommittee during which a proposed amendment allowing medical and dental centers in the PRP was discussed and was determined to have been presented too late to be presented to Town Meeting, in addition to questions regarding whether the use is appropriate in the PRP;
- She stated that veterinarians are also professionals, but are regulated ~~in~~ under their own use category;
- Overturning the opinion of the Building Commissioner would open up the PRP District to development by doctor's offices.

Steve Klein, 67 Larkspur Drive, spoke in favor of the Building Commissioner's opinion, summarized as follows:

- He has worked as a health care provider for over 40 years;
- Common sense would tell you that in discussing professionals that doctor's office would be the first to be identified if they were meant to be included;
- When reviewing the materials, you will see that the intent of the compromise of 2007 was low visitation. A family practice profession schedules appointments every 15 minutes;
- Two physicians and a nurse practitioner is a medical center and would likely see 100 people a day out of that building.

David Bryne, 37 Palley Village Place, spoke in favor of the Building Commissioner's opinion, summarized as follows:

- The Framingham Case [submitted in Mr. MacConnell's packet] says that a town didn't want a specific use, they should have been specific and feels that the Zoning Bylaw is in fact specific by not including it in the professional office category;
- The references made suggesting that development increases the tax base are not relevant to this case as there has not been substantial proof of that provided.

Mr. Bagg stated that the Board has been provided some guidelines from Town Counsel regarding what information is appropriate to consider. He added that this is a public hearing and that the Board has made a concerted effort to take all the testimony. He stated the Board is charged with determining whether the Building Commissioners opinion is valid or invalid and what information they use to make that decision can be a variety of sources as outlined by Town Counsel.

Mr. MacConnell stated that the Board has heard a lot discussion about intent and what people may have felt, but that information is not relevant as provided by Town Counsel. Additionally, the statement by Ms. Barberet makes our argument very well. He said that she pointed out that there were three categories which were designated as high, middle, and low visitation uses. The high visitation use, Section 3.358, does not require an appointment and is not allowed in this zone. The middle category is professionals, predominantly by appointment on the premise, and fits a doctor's office perfectly. The low use category is administrative offices where the public does not visit. We are a professional office and fall within the middle category and as Ms. Barberet indicated the way they chose to control the traffic was to require the offices to be by appointment only. Town Meeting did not say, for example, 16 employees, they didn't say it was four parking spaces, they didn't say it was 10,000 sq. ft., they said uses will be regulated by appointment, and a doctor's office is by appointment.

Mr. MacConnell stated, referring to a statement by Mr. Seewald which indicated that since 1989 a single doctor's offices had been regulated under this category [Section 3.360], that there is no evidence it is true. He added that a new section did come in after Valley Medical was built in 1987; Town Meeting decided that medical centers were too big and took the use out of the PRP.

Mr. Seewald stated that when the Board reads the materials it can be seen that the Planning Board's Report of 2003, Mr. Tucker's letter to Ms. Marcus, and your Town Counsel all have stated that for long before 1989, medical offices were regulated separately. They were regulated separately because they have different impacts than the other types of professional offices. That is what Town Meeting did to segregate out medical offices and it is not true to say that in 1989 Town Meeting decided that Kaiser Permanente was too big and removed it. In 1989, Town Meeting removed all kinds of uses, because they were trying to focus the uses on the spin-off development and to eliminate the pressure from competing development from commercial businesses. It was in that environment, that in 2007, professional offices were allowed. Mr. MacConnell is completely correct that if Amherst did not have a separate category of medical center, under which historically doctor's offices were regulated, that this would fall under professional office. The teaching of the Framingham case is that we have a separate category, it's been used for decades and the medical or dental center category was in the bylaw since the 1960's and that's how doctor's office has been regulated and that is the mille of the 2007 amendment.

Ms. Ford asked the Board if they wish to adjourn and continue the public hearing to a new date. Mr. Beal and Mr. Ehrgood suggested that the Board hear finally from the applicant, and then consider adjourning.

Ms. Marcus stated that she is not a developer and bought the second piece of property to lock in the location for a second building in order to put 40,000 Watts of solar electricity on the first building. She has no interest in real estate development. She and her husband are not Town Meeting members, nor are their attorney and banker. They were not present at any deliberations regarding this matter. They were present at the vote for Town Meeting because they were used for the poster children for who could occupy the PRP, should the zoning change allow visitation. When they decided to build in the PRP, they went to their bank and he said he would not lend them money to build in Amherst, go to Hadley. They went to Mr. Schaffer's office and told him what the bank said. The Town was unbelievably supportive about getting a zoning change to allow professional offices in the PRP and they were very grateful for that. When they made this investment in Amherst, after the bank had reviewed the zoning change and deemed it less of a risky investment, and after their attorney had reviewed the zoning change, they saw no obstruction to professional offices. The Zoning Bylaw said professional offices seeing visitors primarily by appointment in person on the premises. They are asking the Board to do something difficult and look at those words with totally new eyes, as someone who is coming to this town to make an investment without having attended so meetings previous to that. If someone opened the Zoning Bylaw and wanted to build a building with professional offices, not a medical center, they would believe it is allowed. Neither the appellants nor their bank would have made this investment in Amherst if they expected that such clear, simple, easy-to-read language could have been tortured so completely in an interpretation. They are extremely risk-averse people, which is why they are still in business when many of our competitors are out of business. They make their decisions extremely carefully with a great deal of advice. There was an unexplained recusal of a member of this Board which has forced the appellants to start the process over again. This is a hardship and the appellants ask the Board to close this hearing. It is getting very expensive to review one sentence in zoning that seems so clear. When they read the zoning language, there was no reference that spoke to the intensity, volume or duration of visitation. It just said professional offices, seeing visitors primarily by appointment in person on the premises. This did not exclude the woman who came to buy our property. They were stunned when Planning Director Jonathan Tucker told her that she couldn't have an office there. They have found themselves as the bewildered owners of what our president would call a toxic asset. They now own a property that they never had any intention to develop; they bought it strictly to protect the sunlight. They own something that is the basis for our financial model for developing this property.

Ms. Marcus added that they have invested their entire life savings based on that simple sentence reading professional offices seeing visitors primarily by appointment in person on the premises. They have no desire to build a medical center; they simply want to have professional offices. They live in Amherst Woods and do not believe that the Board will do any harm to us or to our neighbors by deciding to call a doctor a professional.

Mr. Ehrgood asked Planning Department staff to provide evidence that doctor's offices were separately regulated over this long period of time under discussion. He stated that he has seen statements that doctor's offices have been regulated separately, but has not seen evidence of actual application of the regulations.

Ms. Ford asked whether the Board is required to look at just the written word of the Bylaw or if they can take into consideration the arguments for and against.

Mr. Bagg indicated that Town Counsel did provide some preliminary information and indicated that the written documentation that formed the basis of Town Meeting's decision is relevant, including Planning Board Reports and minutes, but that the intent of what Town Meeting members were deciding on is not relevant.

Mr. MacConnell stated that based on Town Counsel's opinion, some of the more recent legislative history and what the zoning bylaw stated is relevant, but what others thought, such as planners, lawyers or Town Meeting members is not necessarily relevant.

Mr. Seewald stated that what the Town Counsel's opinion is saying is that the Reports to Town Meeting and Zoning Subcommittee minutes are relevant to understand the context in which it was originally adopted, but that the thoughts of individual Town Meeting members is not relevant.

Mr. MacConnell requested that the Board close the hearing and that he understands that the Board could receive new information even if the hearing is closed.

Mr. Seewald stated that he disagrees, and that the hearing remains open the Board could choose to close it when the Board re-convenes. He added that Mr. Ehrgood has questions which may be an occasion to receive additional information about medical offices being regulated, if that is something that can be found. He added that he assumes that Mr. Tucker and the Planning Board made those statements based on some knowledge of history and if they exist, they should be found.

Mr. Beal asked if there was any further discussion on this matter at this time. The Board members had no further discussion on the matter and determined a date certain.

Mr. Beal made a motion to continue the public hearing to Tuesday, June 23, 2009, at 7:30 P.M. Ms. Ford seconded the motion and the Board VOTED to continue the public hearing to June 23, 2009, at 7:30 P.M.

**Continued Public Hearing:** June 23, 2009

Ms. Ford identified, for the record, a list of communications and information that has been received since the last public hearing, as follows:

- An email correspondence sent at 9:54 A.M. on May 31, 2009 from Denise-Renee Barberet (received on June 8, 2009);
- An email correspondence sent at 1:07 P.M. on June 4, 2009 from Janet Daisley (received on June 5, 2009);
- An email correspondence sent at 11:16 P.M. on June 4, 2009 from Patty Blauner and Peter Blier (received on June 5, 2009);
- A letter from Claire Norton, dated June 6, 2009 (received on June 9, 2009);
- A memorandum, ZBA FY2009-00032 (4), dated June 22, 2009.

Ms. Ford noted that two of the documents were sent via email prior to the public hearing of June 4, 2009, but were not received until after the public hearing due to a bad link on the Town's website.

Ms. Ford then identified, for the record, a list of communications received, today, June 23, 2009, as follows:

- An email correspondence from Michael Jacques, sent at 12:18 P.M. on June 23, 2009 and containing a letter, dated June 23, 2009;
- An email correspondence from David Bryne sent at 3:29 P.M. on June 23, 2009;
- An email correspondence from John Lambdin, forwarded at 4:33 P.M. on June 23, 2009 and containing a letter, dated June 23, 2009.

Ms. Ford stated that the Board would recess briefly to review the materials submitted on June 23, 2009.

Ms. Ford asked if there was any new information that the applicant, or the attorney for the neighbors, would like to present to the Board.

Mr. MacConnell stated that he does not have any new information but would like to comment on the results of the Board's request to the Planning Department for research as to how doctor's offices have been governed over the last 10 to 20 years. He stated that Mr. Bagg had prepared a memorandum, dated June 22, 2009, which identifies a list of permits that have been requested over the past 20 or 25 years. Many on the list were not relevant to this case. What it did show was that there haven't been any instances where the governing law has been this medical center. The only permit that is even close is 12 Dickinson Street. The petitioner requested professional office and that was granted. It is now a doctor's office where it was not petitioned as a medical center. Other locations around town, such as 101 University Drive, was petitioned and granted as professional and technical offices and there are two doctors together there. None of these examples are instructive because medical centers and professional offices are allowed in every zone in the examples provided. The examples do not instruct as to how medical centers or professional offices have been governed over the past two or three decades. He stated that he believes a separate category was created for medical centers, so that if there is a medical center, such as Valley Medical, it is governed under that category and a doctor's office, is governed under professional offices.

Mr. MacConnell summarized by saying that the Board needs to decide whether there is a difference between a medical center and one or two doctor's practicing together and they hope that you find in this zone that a medical office is allowed by right.

Mr. Seewald requested the Board to consider several items for the record. Mr. Seewald submitted the following:

- A map [undated, unlabeled] showing the prospective buildings in the PRP;
- A photograph, dated June 22, 2009, showing the size and scale of the New England Environmental building currently under construction. He noted that the building will be exactly the same building as the second building which has been discussed in connection with this appeal.

Mr. Seewald stated that the day of the single doctor, or single medical practice existing in a building by itself, is over. He identified that Dr. Gladstone, who Mr. MacConnell just referenced, is in a building full of medical professionals. Additionally, Valley Medical Group has all kinds of other uses and 29 Cottage Street has multiple doctors. Mr. Seewald submitted the following:

- A photograph of the sign for Samuel Gladstone, M.D., Family practice;
- A photograph of the sign for Valley Medical Group; and
- A photograph of the sign for 29 Cottage Street.

Mr. Seewald stated that Mr. MacConnell suggests that this is just about Dr. Atkinson and her partner and their nurse practitioner, but if the Board says yes to Dr. Atkinson's practice, then the Board cannot say no to the next practice that wants to come into the practice, and the next, and the next, until it's full. Then the Board cannot say no to the next thing happening in all of the other buildings in that PRP. He added that what is in the record is the intent to allow low traffic-generating professional offices and when all of the buildings are filled with medical professionals who are seeing patients on 15 minute intervals, all day long, it is not a low traffic-generating professional office. Mr. Seewald stated that the memorandum prepared by Mr. Bagg states that the question before the Board is whether or not medical or doctor's offices are a technical or professional office. That is not the question. He stated that they admit that a doctor's office is, in the general vernacular, a professional office. The question is whether it falls within the medical center or the professional offices for the purposes of the PRP. When you add that very important qualifier - for the purposes of the PRP - it becomes much more apparent that it was not intended to allow buildings full of doctors. He stated that he is not suggesting that Dr. Atkinson's practice is a practice full of doctors but once the door is open, it cannot be closed. Mr. Seewald stated that if the Zoning Bylaw is going to change, then Town Meeting should change it. He suggested that perhaps Town Meeting consider two warrant articles; one which expressly allows medical offices in some limited way, and a second which expressly prohibits them and to see what Town Meeting decides.

Mr. Seewald summarized by saying that Ms. Weeks was correct in her analysis, Mr. Tucker, the drafter of the Bylaw, was correct in his analysis, and Town Counsel Mr. Bard was correct in his analysis.

The Board determined that the map submitted by Mr. Seewald is illustrative in nature, showing that other buildings may be allowed in the PRP, but that it is ultimately irrelevant to the case.

Mr. Ehrgood asked the Building Commissioner what was being considered that prompted the zoning opinion currently under appeal, noting that the opinion references a doctor's office in the singular possessive.

Ms. Weeks stated that she was reviewing the concept of a doctor's office in a PRP Zone and whether or not it was allowed.

Mr. Ehrgood stated that in the introductory comments, the Chairperson said that the hearing [as read from the agenda] is regarding the interpretation of Section 3.358.1 and that he feels it is more of a decision of where a doctor's office, in broad concept, belongs. He stated that he understands that the Building Commissioner looked at the four sections in the Bylaw that refer to medical uses and determined that the most appropriate place for a doctor's office is in the medical center category.

Mr. Ehrgood added that the opinion also states that an argument could be made for placing a single doctor's office within one of the office uses and that Town Counsel agreed.

Ms. Weeks stated that because she was not provided with specifics, and was simply asked if a doctor's office could go into the PRP, she looked at whether or not there are many single or individual doctors' offices these days. She added that if you are looking at a single doctor, having one office in the PRP, there could be an argument for that, but I haven't seen that many cases of a single doctor's office.

Mr. Ehrgood asked Ms. Weeks, for example, what would be the difference in making the argument that a single doctor's office would be properly placed, or regulated under 3.358.1, and not two doctors.

Ms. Weeks stated traffic flow. She added that for offices in the PRP zone, the argument has largely been whether the use has a low, medium, or high level of traffic. Once there is more than a single doctor's office, there is a higher volume of traffic, more people in waiting areas, and more uses in the office. She stated that she knows of one medical center that does blood testing where you come in and do not need an appointment, just notice that you need a blood test. When you start looking at variations, unless they can be specific about exactly what the use will be, there will be impacts and the use becomes a center, or more than one. A center by definition is a collection, a place where certain jobs take place, something like a shopping center and is a place where you have collection of activity. This is the other reason why medical center was chosen.

Mr. Ehrgood asked Ms. Weeks if she is speaking in the abstract, from experience, or from the application of the Bylaw. Ms. Weeks stated that she is required to put a use in the category that most closely resembles the use if it is not specifically called out. She stated that she looked at offices and identified that they did not mention medical, and moved to the categories that mentioned medical. In reading her opinion, it says that professional offices did not mention the medical side of things, so she moved to the ones that specifically mentioned medical and tried to place it in there.

Mr. Ehrgood stated that the decision becomes very complicated if there can be arguments for placing one doctor in a professional office.

Ms. Ford asked Ms. Weeks if there was a building containing a single doctor's office with other uses in the building, what would prevent the next doctor, and the next doctor from coming in and how would that be enforced.

Ms. Weeks stated that becomes the problem.

Mr. Ehrgood stated that he is trying to get at the issue; the Board will be drawing fine lines between sections of the Bylaw that are not well designed or precise. He understands that we are trying to identify whether we agree with the opinion or not and if we do, for example, does that mean we are discussing a single doctor's office or the concept of a doctor's office.

Mr. Beal stated that he feels the Board is limited to the issue, but not necessarily the Building Commissioners opinion.

Mr. MacConnell stated that this is not about any one doctor, it's not about Kate Atkinson, what this is really about is how you read the Zoning Bylaw, whether we like it not. The issue is not about what happens if you let one in, and then another and another, or if we had 50 doctors in a building or doctors in other areas of the PRP. He referred to the photograph of the New England Environmental saying that they are going to occupy about 2/3 of the building and does not believe that if they were to lease two or three rooms to a doctor that anyone could say that it is a medical center and it is not allowed.

Mr. Beal asked Ms. Weeks whether a new use would undergo Site Plan Review if the use chart indicates that the use is permitted under Site Plan Review.

Ms. Weeks stated that a new building would require Site Plan Review. For a use that is required to have Site Plan Review, if there is already a Site Plan Review approval on the property, the proposed use is evaluated to see if it will trigger other zoning issues that may not have been addressed. Based on that evaluation, a decision is made whether the use has to go back for another Site Plan Review approval or can the Site Plan Review approval be waived as stated in Section 3.3 of the Bylaw.

Mr. Seewald stated that if the Board were to decide to allow medical offices by right, the Site Plan Review cannot prohibit it or limit the number.

Mr. Beal stated that he understands the purpose of Site Plan Review is not to deny a use, such as the Board could do in the case of a Special Permit, but rather to condition the use so that its impact can be made compatible with the surrounding area. He asked Mr. Seewald for his understanding of what Site Plan Review can do in terms of limiting the intensity or size of a use and traffic.

Mr. Seewald stated that he generally agrees with Mr. Beal's understanding, however, that Site Plan Review is by right and that the Planning Board does not have the discretion to significantly limit or prohibit a use but instead to address aspects such as parking, and to adjust the site layout and design so that the traffic impact associated with a use is less.

Ms. Ford asked Mr. Beal why he was asking about the Site Plan Review process.

Mr. Beal stated that he is trying to get a better understanding of the Site Plan Review process, including what discretion the Planning Board has to condition the use.

Mr. MacConnell stated that the Board should review Section 11.2437 that says a traffic impact report is required and which outlines standards and criteria and if those requirements cannot be met, it requires the applicant to provide alternative proposals, changes to the proposed uses, etc.

Ms. Ford asked staff whether the statements regarding the Site Plan Review process were accurate.

Mr. Bagg stated that it is his understanding that the Planning Board would not necessarily be able to deny a use, but that making the size and scope of the use compatible with the area is something that is within the Planning Board's purview.

Mr. Beal stated that the intensity of a use has been a large focus of the opponent's argument, but the use chart allows other uses such as police and fire stations, schools, museums and libraries which would seem to have a high level of intensity, and are allowed under Site Plan Review in the PRP. He asked Mr. Seewald to address the potential impact of those uses.

Mr. Seewald stated that he doesn't believe those types of uses would produce as great of an impact as a doctor's office. He stated that if you fill a 10,000 square foot building with doctors, which is the extrapolation of a decision of this Board that a use is allowed by right, then you will have a lot more traffic than would be produced by a police station or library. He added that the traffic produced by many doctors, with patients coming and going every 15 minutes, would probably be greater than the other allowed uses. He added that what is being addressed here is a conflict in the language of the Bylaw and that Town Meeting has the ability to say that a police station or library are very traffic intensive, but it is more important to have a place for those uses, and Town Meeting balances those things.

Mr. Seewald stated that in this case, the balance was to allow the pressure of technical and professional offices, but only allow those that do not have high traffic generation. He added that the PRP is not, strictly speaking, the town's business zone and is located close to residential uses.

Ms. Weeks asked the Board if she could make a clarification regarding the argument for a single doctor's office. She stated that before professional offices, including lawyers were allowed in the PRP zone, she had a request for a single lawyer to establish a private office, with no customers coming to the site. At that point lawyers were restricted from the PRP Zone, but this particular lawyer was allowed because the use was in context with what else was happening in the zone. She added that there is always an argument for certain situations.

Fred Moseley, 70 Larkspur Drive, spoke in a favor of the Building Commissioner's opinion, as summarized as follows:

- He would like to address all the previous public hearings that were held regarding the PRP zone and considers them relevant in determining which uses were allowed;
- It was repeatedly stated by Jonathan Tucker and Planning Board members that medical uses were not included in the PRP;
- That understanding was the basis for the compromise of 2007 and that the intended meaning was to exclude medical uses and this is evident in the fact that Mr. Tucker proposed an amendment to the zoning laws in February of 2009 to change the Bylaw to offer clarification.

Ms. Marcus stated that Mr. Tucker did not have the right to make those commitments at her expense without her permission. If that is what he intended to do, then he should have written it down. She added that the Zoning Bylaw is poorly crafted and believes that Town Meeting has an opportunity to change it so the next person who comes along doesn't find themselves in this situation. The Bylaw as written does not make any mention of the duration, frequency or duration of visitation which was eliminated in 2007.

Ms. Ford asked the Board members if they were ready to close the public hearing. The Board agreed.

Mr. Beal MOVED to close the public hearing. Mr. Ehrgood seconded the motion and the Board VOTED unanimously to close the public hearing.

#### **Public Meeting:**

Ms. Ford asked the Board members if they were prepared to state generally whether they are in support of or against the Building Commissioners opinion, as an informal straw vote to help facilitate the deliberation. The Board members were not able to identify their positions sufficiently and entered into a lengthy discussion regarding the nature and scope of the decision they are required to make.

Ms. Ford stated that the Board is to decide whether or not to uphold the Building Commissioner's decision and entering into that decision would be the Board members' definition of different sections of the bylaw and what is permitted or not in the PRP. She added that the Board may want to follow the geography of the Building Commissioner's reasoning starting with Section 3.3 and to decide whether the Commissioner's approach was correct.

Mr. Ehrgood stated if the Board is to step into the shoes of the Building Commissioner, then the question is whether a doctor's office is permitted in the PRP and that a doctor's office is a concept, not a single doctor's office.

Ms. Ford stated that the Board needs to determine if the Building Commissioner interpreted the Bylaw correctly or not.

Mr. Beal stated that the Board is asked to decide if the use, a medical practice, is allowed in the PRP. Furthermore, the Board is not limited to the Commissioner's reasoning or how the issue was framed at that time.

Mr. Ehrgood agreed and stated that the issue is regarding a medical practice, not a single doctor's office, and the question is whether a medical practice is a medical center or is it a professional office.

Mr. Bagg stated that the applicant is appealing the Building Commissioner's decision and there needs to be a decision whether or not to affirm or overturn the Building Commissioner's decision.

Ms. Ford stated that the decision of the Board will affect all of the land that is zoned in the PRP and that ultimately, the Board will have to decide whether the use was appropriately placed under Section 3.360, or whether the use should be considered under Section 3.358.1.

Mr. Bagg stated that the decision would not be specifically determining whether a doctor's office is allowed in the PRP, but rather, whether a doctor's office is to be classified under medical center or professional offices. The result of a decision classifying a doctor's office under professional offices would mainly affect the uses allowed in the PRP and Light Industrial districts. Other business districts would generally not be affected because both medical center and professional office are both allowed by right in those districts. The question is not specific to the PRP, but rather to the use category in the Zoning Bylaw.

Ms. Weeks stated that the Board, if they are replicating the process, would need to review Section 3.3 of the Zoning Bylaw.

Mr. Bagg stated that Town Counsel's opinion suggests that the Board is deemed to step into the shoes of the Building Commissioner, adding that Counsel's opinion references M.G.L. Chapter 40A, Section 14 that allows the Board to make orders or decisions, reverse, or affirm in whole or in part, or modify any order or decision.

He added that the underlying question is therefore whether a medical office is a professional office or a medical center in terms of the Zoning Bylaw. This is the first step that the Building Commissioner took under the requirements of Section 3.3 of the Zoning Bylaw.

Ms. Ford stated that she believes that the Zoning Bylaw specifically emphasizes certain types of technical and professional offices and does not include doctors as it discusses it in other sections. She added that the common usage has been that doctors' offices – large, small, or medium – have been placed under Section 3.360. She stated concern with what happens with the next application if a medical practice is a professional office and that the Board's decision could be framing the future interpretation of the Zoning Bylaw that would be different from what the drafters of the Zoning Bylaw and Town Meeting appear to have intended.

Mr. Ehrgood stated that he believes that there was no evidence showing that small doctors' offices had been regulated separately, as noted in the 2003 Report to Town Meeting. He added that one of the issues seems to be the amount of traffic produced by a doctor's offices, versus an architect's office, for example. That is very relevant to all of the neighbors here and it also seemed to be relevant to Town Meeting because they were thinking about the intensity of use.

Mr. Beal stated that he is still undecided and that there have been good arguments on both sides.

Mr. Ehrgood stated that if the Board decides that a single doctor's office is an appropriate use in the PRP, it would force Town Meeting to address and resolve the issue. Such a decision would not change things on the ground and would necessitate the need to have the issue be taken up by Town Meeting.

Mr. Beal stated that the concern of that suggestion is that it would be similar to writing something into the Bylaw that is not in it now.

Mr. Ehrgood stated that the whole question is an abstraction and that the Building Commissioner and Town Counsel have said that an argument could be made.

Mr. Bagg stated that if the Board were to decide that single doctor is an appropriate use, then the Board would need to say that a single doctor goes into the professional office use category and not medical center. In doing so, the use would be reviewed under Site Plan Review by the Planning Board and if there are no substantial changes to a building, then the use is brought to the Building Commissioner for a further determination as to whether any additional zoning requirements are needed or required. At that point, the Building Commissioner might look at the number of doctors, how many people that person may see, the hours of operation and the use may or may not receive a waiver from undergoing and receiving a Site Plan Review approval from the Planning Board.

Mr. Beal stated that it was difficult to follow that train of thought because there isn't really anything in the bylaw that suggests limiting the number of professionals in an office and the language of the Bylaw speaks in terms of uses and gives examples of professionals and where it is specific as to the number of employees is in the R-VC district. He stated that he understands that line of thinking, but could not follow it.

Ms. Ford stated concern as to what happens after the first single doctor comes in.

Mr. Beal stated that the issue is not relevant if the Board allows a single doctor's office by right.

Mr. Ehrgood stated that there does not seem to be any single doctors, but that the Building Commissioner and Town Counsel are saying that an argument could be made for a single doctor. He added that there will probably not be a series of single doctors lining up to go into the PRP and that the Board's action could indicate that it is time to have the issue sorted out.

Mr. Beal stated that he had originally thought that, in reading Section 3.358, you conclude that one or perhaps two doctors could be a professional office where such a use would be permitted in the PRP under 3.358.1. He added that the argument could be made that the language of the Zoning Bylaw is designed to regulate the intensity of use – and two doctors are allowed to practice in a residential area with a Special Permit – that a similar use in an area that can be used for uses such as manufacturing, or a museum or others, that the use wouldn't be any more intense and would be permissible. That would be stretching the language more than he would be comfortable in reading the Bylaw.

Mr. Ehrgood stated that the Building Commissioner's opinion used loose language regarding arguments allowing a single doctor to be regulated under Section 3.358.1 in order to send a clear signal that it is time to get this issue sorted out.

Mr. Beal stated that he doesn't know how the Board could say just one doctor any more than we could say one engineer or one lawyer, unless there is a mechanism to do that through Site Plan Review. He stated that he is undecided and that he can see arguments on both sides.

Mr. Beal added that in his opinion there are several arguments that could be made that support allowing a medical practice in the PRP, including 1) doctors are not expressly excluded in the professional office category, 2) Planning Department documents regarding a previous iteration of a proposed amendment [April 2003] stated that a physician's office would be excluded from uses allowed in the PRP, but the amendment of 2007 does not include that language, 3) the accessory use section 5.012, identifies doctor's as being part of a recognized profession, 4) the spirit of the amendment [2007] was to increase the number of uses in the PRP and is silent regarding a doctor's office.

Ms. Ford stated that the intent of Town Meeting was to increase the number of uses allowed in the PRP, but that the targeted uses were of a technical nature and that medical practices were not the subject of those discussions and that medical practices were regulated in a separate category.

Mr. Bagg stated that Town Counsel has given advice that the intent of Town Meeting is not relevant.

Ms. Ford stated that she understood the advice and noted that these were explanations identified in documents produced for Town Meeting members.

Mr. Ehrgood stated medical uses are discussed in terms of a range, from very small to large enough to clearly be a medical center. He added that if you just have a broad category then you would put a medical practice into the medical center category. He stated that the whole issue then becomes about what happens at the small end of the spectrum and the Building Commissioner and Town Counsel has indicated that one doctor may be allowed to be considered a professional office, not a medical center.

Mr. Ehrgood stated that the Board seems to have two possible choices. First the Board could determine that all medical uses are in the medical center category. The choice is that the Board could determine that there are some medical uses that may be in the professional office category and others that are in the medical center category. The second choice forces the issue to be further resolved at Town Meeting. He added that he believes the Board has the right to affirm in whole or in part the Building Commissioner's decision and this is relevant in discussing a single doctor's office.

Mr. Beal stated that in terms of reviewing the language of the Bylaw, no one has asked this question before and the concern that if allowing one doctor would lead to a series of individual doctors is not relevant because it would be considered by right. He added that if it is about the intensity of a use, it goes back to what the Site Plan Review process can do to restrict any of the allowed uses.

Ms. Ford stated that the Zoning Bylaw was adopted by Town Meeting. It is her interpretation that if medical uses were intended to be included, they should have been listed.

Mr. Beal stated that if the Board decides to affirm the Building Commissioner's decision it suggests that the only place a medical use, the practice of medicine rather than medical laboratory, is in a medical or dental center.

Ms. Ford asked if the Board allows a single doctor under professional offices then is there any way to limit the amount of similar uses in the PRP.

Mr. Ehrgood stated that there is a history here of discussing a single doctor.

Mr. Beal asked Mr. Ehrgood to present an argument for a single doctor to be allowed under the professional office category.

Mr. Ehrgood stated that the single doctor's office would have one doctor and the intensity would be very low, and that a doctor is not explicitly excluded from Section 3.358.1. To go from one doctor to additional doctors would begin to affect the intensity of things such as traffic and visitation which is a concern identified in the legislative history.

Ms. Ford stated that she interprets the professional office category as allowing architect, engineers, and lawyers and that if doctors were intended to be included, they would have been listed.

Mr. Ehrgood asked how to read the fact that the Building Commissioner and Town Counsel agree that there could be an argument made that a single doctor's office may be properly regulated under Section 3.358.1. He added that, at a minimum, they wouldn't be writing this if it were so clear from the language itself that a single doctor would be regulated under a medical center.

Mr. Bagg stated that Town Counsel's opinion makes it fairly clear that in agreeing with the Building Commissioner, that an argument could be made for an individual doctor in an office to be treated as a professional office and that anything greater than one doctor would be put into the medical center category.

Mr. Ehrgood stated that the Board is supposed to stand in the shoes of the Building Commissioner and affirm in whole or in part. Mr. Ehrgood stated that the Board could conclude that one doctor's office could be allowed in a PRP under Section 3.358.1.

Mr. Bagg stated that he didn't know if the Board can make that determination and expressed concern that the Board could be eliminating the Site Plan Review process.

Mr. Beal stated that he didn't agree with Mr. Bagg's concern and although he is skeptical of taking such a position, that if the Board determines that the use by one doctor for the practice of medicine in the PRP is a use as a professional office that it would still go through the Site Plan Review process.

Mr. Beal stated that the Board is to look at this question as if it were new and are not bound to the words or determination of the Building Commissioner or Town Counsel. He added that the Board's role is to review the Bylaw and decide if the use of the practice of medicine is permitted as a professional office.

Mr. Ehrgood stated that the Board could decide that a single doctor's office is a professional office and all other medical uses would be considered a medical center.

Ms. Weeks asked for clarification whether the Board is discussing a single office or a single doctor.

Mr. Ehrgood stated that he is talking about a single doctor, which may be in one or more rooms.

Ms. Ford asked whether the single doctor gets a physician's assistant and a nurse practitioner and a receptionist.

Mr. Ehrgood stated a single doctor with one support staff.

Ms. Ford stated that if they make this determination, it sounds like the Board is writing in, or creating, a standard.

Mr. Ehrgood stated that the Board would be interpreting the Bylaw by saying that one doctor and one support staff is properly is considered a professional office and any other medical practice is considered a medical center.

Ms. Ford stated that by making that determination, we are actually making a definition of a single practitioner and how that fits into the Zoning Bylaw.

Mr. Beal stated that he has the same problem. He added that the language of the Bylaw does not support a number in that sense and that it is difficult to compare the intensity of a use compared to what would be allowed as an accessory use. He stated that to limit the use to one professional, or a certain number of professionals, stretches the language too far.

Ms. Ford stated that we don't limit the number of any other professionals.

Mr. Beal stated that they are limited in the R-VC zone, but that is a different district under different circumstances.

Ms. Ford stated that until which time the Zoning Bylaw is changed, it is a problem.

Mr. Beal asked Ms. Ford if her position was that any use that involves the practice medicine or dentistry is a medical or dental center under the current Zoning Bylaw.

Ms. Ford stated that at this point in time, that is correct. She added that there is no calibration of intensity written into the Bylaw at this point.

Mr. Ehrgood stated that finding that one doctor is a professional office would be a result of how the Bylaw is interpreted and that it need not be written. He stated that there is significance to the fact that real experts, the Building Commissioner and the Town Counsel, have said there is an argument.

Mr. Beal asked what the argument was.

Mr. Ehrgood stated that the argument could be made by negative implication and said that it is hard to say that one doctor is a medical center.

Mr. Beal said that it is not the doctor that is in question; it is the use of the land in that zone for the practice of medicine. He added that he believes that it is either a use that is permitted, or not. He stated that it doesn't matter how many people are involved in the use.

Ms. Ford asked if the Board has to agree unanimously. Mr. Ehrgood stated that if the Board fails to agree then the Building Commissioners decision is upheld. Mr. Beal stated that it has to be a unanimous decision of the Board to overturn the decision of the Building Commissioner.

Ms. Ford asked the Board if they felt that they would be able to render a decision at this time.

Mr. Beal stated that he did not believe he is prepared to make a decision this evening.

Mr. Ehrgood stated that he would like to offer an argument in support of regulating all medical practices regulated under Section 3.360. He stated that doctors have long been regulated separately from professional offices. Although there is no direct evidence of this, there are assertions. Assuming that that is true, there is no evidence that Town Meeting intended or did move any medical practices into the professional office category in 2007. If these doctors' offices had been regulated separately for a long time, none of them had been regulated under Section 3.358.1. In the language of Section 3.358.1, it is significant that there is no reference to doctors. When someone thinks of professional, the first thing they think of is lawyers; the second thing you think of is doctors.

Ms. Ford stated that that is the argument that she agrees with.

Mr. Ehrgood stated that the only opposing opinion he has is whether it is appropriate for the Board to move the ball along by determining whether a single doctor's office can be regulated as a professional office.

Ms. Ford stated that she doesn't feel that is the appropriate role of the Zoning Board of Appeals. She added that the Zoning Board interprets and that there is a separate process for that. She stated that people can submit a citizen petition to Town Meeting to the Planning Board; the Planning Board itself can initiate a change to the Bylaw which is required to have public hearings.

Mr. Beal stated that it is entirely appropriate for the Board to determine what uses are permitted, that is part of the Board's duty. He stated that based on the recommendation of Town Counsel, his opinion of the process is to begin with the Bylaw as written. He stated that it is appropriate to look at the zoning scheme as a whole, including the written documents regarding the history of the Bylaw, but not to give any weight to statements made by individual Town Meeting members. He added that based on the recommendations of Town Counsel, he will limit himself to what is in the written record and not ~~peoples~~ oral statements about what they mean. He stated that he has read documents submitted by members of the public and those are probably given the lowest amount of relevance in deciding this case.

Mr. Beal asked the applicant's attorney and the attorney representing the neighbors if they agreed with his assessment of the materials that should be considered.

Both parties agreed.

Mr. Beal asked staff whether the Board took a vote and there was at least one vote to affirm the Building Commissioner's decision, would that be sufficient for purposes of this appeal to come out with a decision, written findings, and our conclusions.

Mr. Bagg stated that he was not entirely sure if that would be enough. He stated that each position would need to have evidence and statements backing each position.

Mr. Beal stated that the statute requires a unanimous vote to reverse or overturn the decision of the Building Commissioner.

Mr. Seewald stated that without a unanimous vote, the appeal fails.

Ms. Ford stated that the Board members may need to identify each of their positions, substantiated by facts, and then take a vote.

Mr. Beal stated that the Board would have to be unanimous to overturn or modify the Building Commissioners decision.

Mr. Beal MOVED to continue the public meeting to Tuesday, June 30, 2009 at 7:30 P.M. Ms. Ford seconded the motion and the Board VOTED to continue the public meeting to Tuesday, June 30, 2009, at 7:30 P.M.

**Continued Public Meeting: June 30, 2009**

Ms. Ford asked the Board members if they were any more certain about where they stand on the matter. Mr. Beal and Mr. Ehrgood stated that they were.

Ms. Ford asked the Board members if they wanted to announce their positions. She stated that she supports the Building Commissioner's decision. Mr. Beal stated that the decision of the Building Commissioner should be affirmed. Mr. Ehrgood stated that he agrees with the decision of the Building Commissioner. The Board determined that each member should separately state the basis of their decision.

**Findings:**

Ms. Ford explained her reasoning. She stated that she utilized Section 3.3 of the Zoning Bylaw, which says that a use must be classified into a use category that is most similar to the use. Section 3.3 states *"For the purposes of this Bylaw, existing and future uses of land, buildings and other structures shall be allocated among the following categories. It is intended that every possible use be included in some category, and a use that does not readily fall into any category listed shall be included in the one to which it is most similar"*. She added that she reviewed all the different use categories listed in Section 3.3, including Sections 3.358 [Office uses] and Section 3.360 [Medical and dental center]. She concluded that there are various reasons why a doctor's office does not belong in Section 3.358.1. The use is a medical activity and that the Bylaw identifies medical activity in a separate category other than Section 3.358.1, Technical and professional offices. She stated that Section 3.360 is the category that most closely resembles the use of a doctor's office or a medical office.

Ms. Ford stated that she referenced the Planning Board minutes of May 2, 1989, [an attachment to staff memorandum, ZBA FY2009-00032 (3), dated June 4, 2009] which states the intent of the PRP Zone was to be for light, clean, high-tech industry, not just additional professional offices. She added that page 2 of the minutes discusses the types of uses that would be restricted [including *"professional and business offices: Although a professional park, the category including professional and business offices seems to imply high traffic retail-type offices. Mr. Mitchell suggested allowing only those businesses 'not dealing directly with the general public,' as a way to restrict the volume of traffic"*].

Ms. Ford stated that there was a question as to when a medical office becomes a medical center. She added that there is nothing in the Zoning Bylaw that provides any direction in order to answer this question and the use therefore seems to have been put into the use category of Section 3.360.

Ms. Ford stated that in 1978, the Office Park Zoning District was created [reference to staff memorandum, ZBA FY2009-00032 (3), dated June 4, 2009, containing information regarding the 1978 Town Meeting] and that Section 3.366, medical and dental center, was created. She added that in 1979 [Article 59, May 1989], the PRP District was created and Section 3.366 was disallowed in the PRP and other categories, such as Section 3.360, Real estate, insurance, professional office, were in a separate category. She stated that page 5 of Article 59 states that *"the Planning Board also is proposing some changes to the list of uses allowed in the PRP District, with the intent of restricting this district to uses that are appropriate to a research park...and ought to be reserved for research, office space, and light industry"*. Ms. Ford added that the Bylaw has evolved to find uses that would work in those areas. She stated that even at that time, there were distinctions between the two types of uses and therefore supports the interpretation that medical activities do not belong in the same use category with insurance or professional offices.

Ms. Ford stated that she agrees with the Building Commissioner's opinion that the most appropriate category is medical and dental centers. She stated that the other categories, such as hospitals and nursing homes, are larger and more institutional uses and distinct from medical or dental centers and that there are other places in the Zoning Bylaw where medical or dental centers are allowed.

Mr. Beal explained his reasoning. By way of procedural history, the petitioner Carex, LLC requested a zoning decision regarding a medical office use within the PRP. [Letter dated March 6, 2009 from Bonita J. Weeks to Julia C. and Michael J. Marcus]. In response to Carex's request for a decision, the Commissioner determined that a doctor's office is not a permitted use in the PRP. The Commissioner reasoned that under Section 3.3 of the Zoning Bylaw, which provides that a use that does not readily fall into any category listed shall be included in the one to which is most similar, a medical office use is most similar to the use category medical or dental center as provided in Section 3.360. As a medical or dental center is not a permitted use in the PRP, the Commissioner concluded that a doctor's office is not a permitted use in the PRP. [Decision of the Commissioner dated February 6, 2009]. In her decision, the Commissioner stated that, although an argument could be made that a single doctor's office might be permitted in a PRP as a professional office under Section 3.358, she concluded that because Section 3.358 does not mention medical uses, and because it is rare to have only a single doctor's office in a building, even a single doctor's office is not permitted in the PRP.

Mr. Beal noted that Town Counsel, Joel Bard, Esq., provided a legal opinion that in general concurred with the Commissioner's decision. [Email dated February 27, 2009]. It stated that "according to Jonathan Tucker, a single doctor's office has been treated in the past as a professional office, but few doctors nowadays operate on their own. If the proposed doctor's office involved a single practitioner, there might still be an argument for treating it as a professional office rather than a medical center. However, assuming that what is proposed is a building which would house more than one doctor, it is my opinion that the use should be classified as a medical or dental center". Carex timely appealed from the Commissioner's decision pursuant to Massachusetts General Law, chapter 40A, Sections 8 and 15. It appears that Carex, as owner of property affected by the use restrictions in a PRP district, is an aggrieved party entitled to bring this appeal. Mr. Beal stated that he also noted Massachusetts General Law, Chapter 40A, Section 14, the Powers of Boards of Appeals, which provides in relevant part *"A board of appeals shall have the following powers: (1) to hear and decide appeals in accordance with section eight... In exercising the powers granted by this section, a board of appeals may, in conformity with the provisions of this chapter, make orders or decisions, reverse or affirm in whole or part, or modify any order of decision, and to that end shall have all of the powers of the officer from whom the appeal is taken"*.

Mr. Beal added that he observes that, because the petitioner did not apply for a use permit, there is no factual record regarding the petitioner's proposed medical use. Accordingly, he stated that his thinking was not informed by any information regarding the petitioner's intentions regarding its property with respect to that use and that it would be inappropriate to consider such facts because a permit was not requested. Rather, the issue raised on appeal involves interpretation of certain of the bylaws as a matter of law.

Mr. Beal stated that by way of analysis, on appeal, Carex argues that the Commissioner improperly determined that a doctor's office is not a technical or professional office as is defined in Section 3.358 of the Town of Amherst Zoning Bylaws, but that it is more like a medical center and therefore should not be an allowed use for offices in the PRP Zoning District. [Schedule A attached to application of Carex, Inc. dated April 1, 2009].

He added that he concludes that the plain language of the Bylaw supports the conclusion that, because a medical office use is most similar to the medical or dental center use provided at Section 3.360, and uses under that section are not permitted in the PRP, a medical use, even a single doctor, is not allowed in the PRP. He affirms the determination of the Commissioner that a medical office, even a medical office consisting of a single doctor, is not a permitted use in the Professional Research Park Zoning District.

Mr. Beal stated that, as the Chair mentioned, the interpretation of permissible uses under the Bylaw is guided by Section 3.3, entitled Use Classification and Standards. Based on the language of that section, he concluded that a proposed use must fall into one, and only one, category of use.

This conclusion flows from the language used in Section 3.3, namely that every possible use be included in some category; a use that does not readily fall into any category listed shall be included in the one to which it is most similar. Throughout, Section 3.3 speaks in terms of, a use, fitting into a single category, not multiple categories. In short, under Section 3.3, a proposed use is regulated under a single classification. A use that does not readily fall into any category listed shall be included in the one category to which it is most similar.

Mr. Beal stated that in this case, the proposed use is the provision of medical services to members of the public in person on premises located within the PRP. It is assumed that such services would be provided predominantly by appointment as defined in the standards and conditions to Section 3.358.1. In her decision, the Commissioner determined that a doctor's office is "most similar" to a medical or dental center per Section 3.360. He noted that, in resorting to the "most similar" analysis, the Commissioner's decision assumes that a doctor's office does not, in the language of Section 3.3, readily fall into any category listed in the classifications in Section 3 of the bylaws. Although not necessary to this appeal, it appears that the application of the "most similar" analysis follows from the lack of a use category that expressly uses the words doctor's office. It is not clear that the invocation of certain words in, for example, an applicant's request for a decision or permit should determine the analysis by which a proposed use is classified under Section 3. Although it is not necessary to this appeal, it seems possible that one could reasonably conclude that a medical office does "fall readily" within the medical center use of Section 3.360 and never reach the "most similar" analysis.

Mr. Beal stated that under the "most similar" analysis of Section 3.3, as discussed in the Commissioner's decision, there are four classifications in Section 3 that expressly provide for medical uses: Institutional uses under 3.33, specifically Medical or Residential Institutions as provided by 3.336.0 and 3.336.1, and Retail, Business and Consumer Service Uses under 3.350, specifically 3.359 (Medical laboratory) and 3.360 (Medical or dental center). Of the four use classifications that expressly provide for medical uses, for the reasons stated in her decision, he agreed with the Commissioner that a doctor's office is most similar to a medical center under 3.360.

Mr. Beal noted that Carex does not argue on appeal that a doctor's office is permitted under any of the other three medical use categories. Nor does Carex dispute that medical uses are covered by the medical center classification. Instead, Carex contends that a medical office, used by a medical professional such as a medical doctor to provide medical services to the public on the premises, is an office use under Section 3.358. Specifically, Carex argues that such an office is a technical or professional office under Section 3.358.1.

He stated that he concludes that, for purposes of use classification under Section 3.3, use of an office by a medical professional, such as a medical doctor, to provide medical services to the public, whether by appointment or otherwise, is most similar to the medical center classification of 3.360, and not to the technical or professional office classification of 3.358.1.

Mr. Beal stated that first, while 3.360 expressly references uses of land for medical purposes, 3.358 contains no such language. Physicians or medical professionals are not among the types of technical or professional businesses expressly listed in Section 3.358. In this connection, as has been noted by others, doctors are expressly listed in Section 5 as professionals for purposes of accessory uses, suggesting that the omission of physicians from the types of professional offices permitted under Section 3.358.1 was intentional.

He added that the medical center classification is not defined in Section 3.3. According to Webster's New International Dictionary (Unabridged), version unknown, the word medical is defined in relevant part as (1) of, relating to, or concerned with physicians or with the practice of medicine, and (2) requiring or devoted to medical treatment.

Mr. Beal stated that the fact that the classification at 3.360 contains the word medical, which commonly is understood to relate to physicians and the practice of medicine, whereas Section 3.358 contains no language related to medical offices or the practice of medicine, strongly suggests that, as between 3.360 and 3.358.1, use of an office for medical purposes is most similar to a medical center and not to a professional office as that phrase is used in 3.358.1. Mr. Beal stated that that is the heart of the issue.

Mr. Beal stated that although not necessary to decide this appeal, it seems that the use of the phrase professional office in Section 3.358 is informed by the surrounding language in the various subsections and should be construed in that context. All three offices uses under Section 3.358 include the term professional office. For example, in Section 3.358.0, the terms professional office are used in connection with banks and other businesses providing financial services: bank, loan agency, real estate insurance or other business or professional office. Likewise, in 3.358.2, the use of the term professional office is informed by the term administrative business office. As with these sections, the meaning of professional office in Section 3.358.1 must be construed in light of the surrounding language. As with the other subsections in 3.358, the type of professional office permitted in Section 3.358.1 is suggested by the limiting language such as architect, engineer, lawyer, financial services or similar office.

In this context, the scope of the term professional office in Section 3.358.1 does not include all professionals; rather, by its terms, it reasonably may be read to include only those professional offices expressly listed - architect, engineer, lawyer, financial services - and professionals similar to those expressly listed. He stated that because the surrounding language in Section 3.358 informs and limits the meaning of the term professional office, he finds that resort to dictionary definitions of professional, which are not limited by such language, is not necessary and would not be appropriate. Again, although this consideration is not in his view necessary to decide the issue raised on appeal, the structure and context of the use of the words professional office in the various subsections of Section 3.358, along with the omission of physicians as the type of professional offices to be included, is consistent with the conclusion that medical offices are not professional offices under Section 3.358.1.

Mr. Beal stated that second, the conclusion that medical offices are not permitted in the PRP as professional offices is consistent with other sections of the Bylaw that prohibit certain uses in the PRP. For example, veterinary establishments under Section 3.357 and personal care services under Section 3.351 are not permitted in a PRP. These uses arguably are more similar to medical services than are the uses listed in Section 3.358.1. The fact that such services are not permitted in the PRP lends further support to the interpretation that the professional office contemplated in Section 3.358.1 does not include medical offices.

He stated that third, because he thinks that the language of the relevant bylaws clearly supports the Commissioner's decision that a medical office is most similar to a medical center and is not most similar to a professional office as that term is used in 3.358.1, that consideration of the so-called legislative history is not necessary to decide this appeal. Even if the history is considered, it seems that that the available materials are not inconsistent with the Commissioner's conclusion. By way of example only, an earlier proposal of the office uses classification in Article 3, a Planning Department document states that medical offices are not listed as uses currently permitted in the PRP district, and it further states that under the proposed amendment certain office uses would not be permitted, including medical/personal care offices and veterinary offices. [Amherst Planning Department document dated April 2003]. The proposed language for that article is substantially the same as the current text of Section 3.358.1. As noted previously, veterinary and personal care offices currently are not permitted in the PRP.

Mr. Beal stated that furthermore, in 2009, an amendment to Section 3.358.1 was proposed to expressly allow medical offices. [Draft proposed language regarding Medical Offices dated 2/12/09 and Zoning Subcommittee minutes dated February 18, 2009]. He stated that it shows that if such medical offices were already permitted in the PRP, there would be no need for amendment.

Mr. Beal added that he does not give the history, and that specific piece of history, a lot of weight and noted it for purposes of saying that it is consistent with how he reads the language of the Bylaw. Again, although the history is not necessary to decide the issue on appeal, it is consistent with the conclusion that the term professional office as used in Section 3.358.1 was not intended to include medical offices. He added that, although he appreciates efforts of the participants at the public hearing to assist the board, and has reviewed all of the materials submitted, in the end, as explained above, he does not rely on such materials to reach his conclusion. Mr. Beal stated that in conclusion, he finds that the Commissioner correctly determined that, under Section 3.3, use of land for a doctor's office is most similar to a medical center classification under Section 3.360, and is not most similar to a professional office classification as that term is used in Section 3.358.1. Further, under Section 3.360, a medical center is not permitted in a PRP district. Accordingly, he would affirm the Commissioner's decision that a doctor's office is not a permitted use in the PRP district.

Mr. Ehrgood stated that he views this as an appeal of a decision of the Building Commissioner that doctors' offices, broadly speaking, are medical centers and are prohibited in the PRP. He added that this is important because the first paragraph of the Building Commissioner's opinion says a doctor's office in the singular possessive. This creates a question as to whether the opinion is regarding a single doctor's office or doctors' offices more broadly. He stated that as the Building Commissioner indicated during the meeting of June 23, 2009 and as one understands from the context of the overall opinion; the discussion is not regarding a single doctor's office, but rather doctors' offices as a concept. He added he agrees with the Building Commissioner's opinion, which states that doctors' offices are most appropriately regulated as medical centers.

Mr. Ehrgood stated that the Planning Department memorandum, dated June 22, 2009, provides examples of applications of the Bylaw where doctors' offices have been regulated as medical centers. He added that the appellant has argued that some doctors' offices are not medical centers, but instead are professional offices.

Mr. Ehrgood stated that he has tried very hard to find a legal basis to support that argument in the Zoning Bylaw, in the Bylaw's application, and in the legislative history, but has not been able to do so. He stated that there is no basis to draw a line between the two categories. He noted that there was not a proposal presented that identified a specific number of doctors to use in order to try to draw a line. The result is having to review this case in the abstract within a broad category of medical practices and identify whether at the smaller end, there is some way to determine that a small practice would not be a medical center, but rather a professional office. He stated that there is no basis to separate medical centers, one use, into two categories of medical centers. He noted that he had tried to make an argument in support of this reasoning, but was unable to do so. He added that if you make the argument that one doctor's office could be classified under Section 3.358.1, the next issue immediately raised is whether it is one doctor and an assistant, or more. He noted that there are no other numerical limitations to the other professional offices listed within Section 3.358.1 and furthermore there is no basis in the Bylaw to identify what a medical center is based on size. He stated that he is not the first to identify this issue and noted that Jonathan Tucker had observed that there is no basis from which to draw a line between what kind of medical office could be professional office or medical center [page 7 of staff memorandum, ZBA FY2009-00032, dated April 17, 2009].

Mr. Ehrgood stated that the absence of any reference to a doctor in Section 3.358.1 is very significant. He said he agrees that when one thinks of a professional, one immediately thinks of a doctor. But in Section 3.358.1 there is no reference to doctors, no reference to patients, and therefore the language of Section 3.358.1 does not support the conclusion that Section 3.358.1 is the correct category to regulate some undefined size medical practice.

Mr. Ehrgood stated that making the decision is very difficult. The Board members want to support Amherst businesses and primary care medical practices while recognizing neighbors' interests and concerns. He added that this case made him want to find some legal basis to do this, but he just cannot find it.

The Board members discussed one another's positions and agreed that the statements of each Board members position [see page 26 through page 31] should be considered as the findings of the decision.

The Board determined that a motion does not need to include a specific statement denying the appeal because by affirming the opinion of the Building Commissioner, the Board is denying the appeal.

**Zoning Board Decision:**

Mr. Beal MOVED to AFFIRM in whole the decision of the Building Commissioner that one or more doctors' offices properly fall within the use classification of Section 3.360, medical or dental center, of the Amherst Zoning Bylaw. Mr. Ehrgood seconded the motion.

For all the reasons enumerated above, the Zoning Board of Appeals VOTED unanimously to AFFIRM in whole the decision of the Building Commissioner that one or more doctors' offices properly fall within the use classification of Section 3.360, medical or dental center, of the Amherst Zoning Bylaw, based upon the appeal submitted by Carex, Inc., at Research Drive (Map 21B, Parcel 81, PRP Zone).

The Zoning Board of Appeals decision shall constitute a DENIAL of the Appeal.

\_\_\_\_\_  
BARBARA FORD

\_\_\_\_\_  
ERIC BEAL

\_\_\_\_\_  
TOM EHRCOOD

FILED THIS \_\_\_\_\_ day of \_\_\_\_\_, 2010 at \_\_\_\_\_,  
in the office of the Amherst Town Clerk \_\_\_\_\_.

TWENTY-DAY APPEAL period expires, \_\_\_\_\_ 2010.

NOTICE OF DECISION mailed this \_\_\_\_\_ day of \_\_\_\_\_, 2010  
to the attached list of addresses by \_\_\_\_\_, for the Board.

NOTICE OF PERMIT or Variance filed this \_\_\_\_\_ day of \_\_\_\_\_, 2010,  
in the Hampshire County Registry of Deeds.